Office - Supreme Court, U.S.
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No. 80-1666

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN R. LARSON, Commissioner of Securities, et al.,

Appellants,

—v.—

PAMELA VALENTE, et al.,

Appellees.

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, AND THE MINNESOTA CIVIL LIBERTIES UNION, *AMICI CURIAE*

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INTEREST OF AMICI CURIAE*

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members, dedicated to defending and preserving the principles embodied in the Bill of Rights. The Minnesota Civil Liberties Union is one of its state affiliates. The ACLU has been involved in many of the leading First Amendment cases by which separation of church and state has been maintained, including Murdock v. Pennsylvania, 310 U.S. 105 (1943), Engel v. Vitale, 370 U.S. 421 (1962), Lemon v. Kurtzman, 403 U.S. 602 (1971), and Committee for Public Education v. Nyquist, 413 U.S. 756 (1973).

First among the liberties secured by the Bill of Rights is a guarantee

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*Letters consenting to the filing of this brief have been lodged with the Clerk.

of religious liberty and complete separation of church and state. As this Court has consistently recognized, that guarantee protects the state from the divisive consequences of religious strife over secular matters, and religion from the intrusive and controlling hand of state regulation. The Act at issue here subjects the basic and necessary activities by which religious organizations fund themselves to carry on their religious missions to a system of prophylactic state regulation far more extensive than has ever been sanctioned by this or any American court. If upheld, the Act would place the state permanently astride the means by which churches operate, a result wholly at odds with the Religion Clauses of the First Amendment.

To protect these vital rights which Minnesota has placed in jeopardy, amici submit this brief, and respectfully urge the Court to rule that the Act is an impermissible attempt to intrude on and regulate activities which, if they may be overseen at all, can only be regulated far more narrowly than the challenged Act requires.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici agree with the Courts below, and with appellees, that Minnesota's Charitable Solicitations Act (hereafter "Act") is an impermissible "religious gerrymander", in violation of the establishment clause of the First Amendment. The Act is a complex regulatory scheme designed to prevent fraudulent or deceptive practices by charitable organizations, but exempts some religious organizations from certain registration and disclosure requirements. As the courts below found, that exemption violates the establishment clause because it has the improper purpose and effect of favoring exempted religions over unexempted religions.[1/]

1/ The Act exempts a religious society or organization which received more than half its contributions "(1) from persons who are members of the organization; or (footnote continued on following page)

This brief will not, however, address the validity of that exemption, but will urge another ground for affirmance that was raised below but not addressed by the Eighth Circuit.[2/] If the Court does not find the Act invalid on establishment grounds, it must find the Act unconstitutional on another ground, excessive entanglement of church and state, or at least remand for consideration of that ground. The Court has struck down statutes providing public aid to religious organizations because the government entanglement with religion was excessive, but has never decided whether a regulatory scheme

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(footnote continued from preceding page)
(2) from a parent organization or affiliated organization; or (3) from a combination of the sources listed in clauses (1) and (2)." Minn.Stat. §309.515, subd. 1(b).

2/ The Eighth Circuit entered an order limiting consideration of constitutional issues to those addressed in its opinion. 637 F.2d 562, 564 n.3 (1981).

such as the Act, which does not involve public aid, may nevertheless be invalid because of excessive entanglement. This case presents an appropriate occasion for the Court to settle the constitutionality of a comprehensive scheme of disclosure and regulation when applied to religious organizations.

I. The Religion Clauses are violated by statutes which either advance or inhibit religion. Committee for Public Education v. Nyquist, 413 U.S. 756, 788 (1973); Walz v. Tax Commission of New York, 397 U.S. 664, 669 (1970). Statutes which entangle government in the affairs of religious organizations are invalid because they may have an impermissible inhibiting effect, deflecting religious organizations from religious activities and warping decisions in a direction decreed by state, not church. Walz, supra,

397 U.S. at 669-670; Lemon v. Kurtzman, 403 U.S. 602, 620 (1971). No actual inhibition need be proved for entanglement to be unconstitutional; regulation need only present the potential for government direction of religion. Lemon, supra, 403 U.S. at 620-621. This Court has relied on an impermissible entanglement analysis to forbid three types of government activity required by the Act. They include:

(A) Comprehensive and continuing government surveillance and evaluation of religious organizations to enforce statutory or administrative standards, Lemon, supra, 403 U.S. at 619-622. The Act's disclosure requirements, investigatory powers and regulatory standards, enacted to guard against fraud, create continuing government scrutiny of the financial decisions of religious organizations.

(B) Government interference with the shaping and administration of a church's religious affairs, Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 115-121 (1950). The Act's restrictive spending limitations and burdensome filing requirements will interfere with the freedom of churches to shape and administer their religious missions.

(C) Investigation and interpretation of religious doctrine by civil authorities. Presbyterian Church v. Hull Church, 393 U.S. 440, 450 (1968). The Act's mandate that expenditures be "reasonable" involves the state in investigation and interpretation of religious doctrine when it attempts to discover the bases for church expenditures.

II. No reason has been asserted that would justify the entanglement required by the Act. In areas touching on religion and other First Amendment freedoms, broad

prophylactic rules are impermissible, and the state must further its interests by means calculated to minimize intrusions on protected freedom. In Re Primus, 436 U.S. 412, 432 (1978); NAACP v. Button, 371 U.S. 415, 438 (1963); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); Sherbert v. Verner, 374 U.S. 398, 407 (1963). The state has not demonstrated, and could not on this record assert, that its interests could not be fully and effectively served by far narrower statutes punishing forbidden conduct, such as fraud, while leaving protected activity free of continuous and intrusive state oversight.

ARGUMENT

I. THE ACT REQUIRES EXCESSIVE ENTANGLEMENT OF CHURCH AND STATE IN VIOLATION OF THE FIRST AMENDMENT.

Statutes that entangle government in the affairs of religious organizations are invalid because they may lead to

government control of churches or government restraint of religious practices. Walz v. Tax Commission of the City of New York, 397 U.S. at 669-670; Lemon v. Kurtzman, 403 U.S. at 620. The Court has found the potential for government direction of churches sufficient to rule a statute unconstitutional. Id. at 620-621. Due to the "self-perpetuating and self-expanding propensities" of modern government, regulations that are not historically well-established are particularly suspect. Id. at 624. See Walz, 397 U.S. at 676-677.

Although the permissible limits of entanglement have been called "blurred and indistinct", Lemon, 403 U.S. at 614, the Court has identified three types of prohibited entanglement. The first, surveillance and evaluation of religious organizations, has been called an "inde-

pendent evil", id. at 624-625, but may also signal the presence of the other types of impermissible entanglement -- government interference in religious affairs, and government investigation and interpretation of religious doctrine.

A. The Act Requires Comprehensive and Continuing Government Surveillance and Evaluation of Religious Organizations to Enforce Statutory and Administrative Standards.

Comprehensive and continuing government surveillance and evaluation of religious organizations toenforce statutory or administrative standards has been prohibited under the Religion Clauses. Meek v. Pittenger, 421 U.S. 349, 367-370 (1975) (state supply of specialized educational services on religious-affiliated school premises fostered an impermissible entanglement because of the "prophylactic contacts" required to ensure that teachers played "a strictly nonideological role"); Lemon, 403

U.S. at 619-621 (state-funded supplements to salaries of teachers in secondary and elementary church-affiliated schools created created excessive entanglement because they entailed state surveillance, inspection and evaluation of schools to ensure that state funds were not supporting religious teaching and to determine school expenditures attributable to religious activity.)[3/] In fact, the Court has upheld

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3/ Only very limited government monitoring is allowed. Fire inspection, building and zoning regulations and compulsory school attendance laws are necessary and permitted. Lemon, 403 U.S. at 614. Limited oversight of church-affiliated schools which accept government aid is also permitted, when the schools are not pervasively religious, Roemer v. Maryland Public Works Board, 426 U.S. 736, 764-66 (1976), or where the type of aid makes excessive government involvement unnecessary. Committee for Public Education v. Regan, 444 U.S. 646 (1980).

some laws exempting religious organizations from their coverage precisely because a different rule might require excessive entanglement. Walz, 397 U.S. at 674-675.

The Act creates the kind of comprehensive and continuing government surveillance and evaluation of religious organizations that is prohibited by the Religion Clauses. It creates a complex regulatory scheme of government inquiry into the fund-raising and expenditures of religious and charitable organizations, ostensibly to prevent fraudulent and deceptive practices. The prophylactic methods employed by the Act include complete and detailed financial disclosure requirements, unlimited government investigatory powers, and imposition of a "reasonableness" standard to govern expenditures. Before solicitation may occur, the Act requires a detailed

registration statement,[4/] annual financial

4/ The "Registration Statement" must include: the organization's legal name; the name or names under which it solicits contributions; form of organization; address of principal office in state or address of person having custody of the books; names and addresses of officers, trustees and the chief executive officer; federal and state tax exempt status; denial at any time of right to solicit contributions; date on which accounting year ends; general purposes of the organization; general purposes for which contributions to be solicited will be used; methods of solicitation; copies of contracts between charitable organizations and professional fundraisers relating the fundraisers' profits; the group or individual having final discretion as to distribution and use of contributions; the amount of total contributions; and a financial statement for the preceding 12 month period. Minn. Stat. §309.52, subd. 1(a) - (o); subd. 2.

reports,[5/] licensing of professional fundraisers,[6/] and disclosure of any other information the Minnesota Department of

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5/ The Annual Report must include: a financial statement for the preceding 12 month period of operation, a balance sheet, statement of income and expense, and statement of "functional expenses." Full disclosure must be made of total receipts and income from all sources; cost of management, "general", and fundraising ; cost of public education; fund or properties transferred out of state with an explanation; total net amounts disbursed for each major purpose, charitable or otherwise; and names and financial compensation or profit of fundraisers. Minn.Stat. §309.53, subd. 2, subd. 3.

6/ The statute requires professional fundraisers to be licensed and permits the department to require bonding under "such terms and conditions as the department determines are necessary and appropriate" for the public's protection. It also permits the department to require fundraisers to produce financial reports. Minn.Stat. §309.531.

Commerce ("Department"), in its discretion, may require to "promote fairness." (Minn. Stat. §§309.52 - 309.531). All documents that must be filed become part of the public record. (Minn.Stat. §309.54, subd. 1). In addition, the Act gives the Department unlimited investigatory powers, enabling the Department's commissioner to compel testimony of witnesses or production of documents if he thinks any person is about to violate any provision of the Act. (Minn. Stat. 309.533).

The Act's use of disclosure requirements and investigatory powers involves the state in excessive entanglement with the religious organizations it seeks to regulate. Like the activities of church affiliated schools, see Meek v. Pittenger, 421 U.S. at 367-370, and Lemon, 403 U.S. at 619-621, the activities of the reli-

gious organizations regulated by the Act are pervasively religious. Church fund-raising is a protected religious activity, Cantwell v. Connecticut, 310 U.S. 296 (1940), and certainly a church's expenditure policies go to the heart of its religious mission, just as a charitable organization's expenditures reflect its charitable purposes. Cf. Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620, 635 (1980).

In addition, the Act involves the kind of ongoing, comprehensive inspection the Court warned against in Lemon v. Kurtzman. Like the need to prevent state funding of religious teaching or the task of determining secularly-based expenditures, Minnesota's goals of ensuring full disclosure and "reasonable" expenses necessitate continuing state scrutiny of the administration and finances of religious organ-

izations. At the very least, the Act requires that every dollar of church income and every dollar of church expenses be documented, disclosed to the state and opened to the public. Even greater intrusion is permitted, however. The Act gives the Department carte blanche to interrogate any church official about any church matter and examine any church document in quest of information about violations it thinks may occur. As the Court said about government auditing of school financial records in Lemon v. Kurtzman, 403 U.S. at 620:

> This kind of inspection and evaluation of the religious organization is fraught with the sort of entanglement that the Constitution forbids.... [w]e cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses.

B. Government Interference With the Shaping and Direction of a Church's Religious Affairs.

Undue government interference with the shaping and administration of a church's religious affairs is impermissible. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 503-504 (1979) (jurisdiction over church-affiliated schools would create serious First Amendment questions because the NLRB's secular aims might conflict with and subvert a school's religious mission); Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 698 (1976) (civil courts could not decide dispute over the defrocking of a bishop but had to defer to the decision of the highest church authority); Kedroff v. St. Nicholas Cathedral, 344 U.S. at 115, 120 (New York State could not remove a church from central Russian Orthodox church and award it to American branch

since the question was "strictly a matter of ecclesiastical government.")

Application of the Act to religious organizations interferes with their ability to shape their fundraising, management and prosyletizing activities. It imposes a secularly-determined standard of "reasonableness" (Minn.Stat. 309.555) on expenditures for fundraising, general and management costs, and salaries,[7/]

7/ The Act requires religious organizations subject to registration requirements to expend only a reasonable amount for management, general costs and fundraising costs. An amount in excess of 30% of total income and revenue is presumed unreasonable and may be challenged. Minn.Stat. §309.555, subd. 1a. The religious organization, however, may defend by claiming extenuating circumstances. Minn.Stat. §309.555, subd. 5. The Department, as explained in Point I.B., may attempt to impose its own secular standards of reasonableness on the religious organization. Or, as Point I.C. illustrates, it may attempt to discover whether a church's religous tenets warrant expenses that exceed the Act's presumptive limitations. Either of these courses is constitutionally prohibited.

enforcing it with threats of investigation, hearings, prohibition of fund-raising, receivorship and misdemeanor charges if the organization does not comply. (Minn.Stat. §§309.532 - 309.534, §§309.58 - 309.581).

The Court has recognized that imposition of secular standards by a government regulatory agency may interfere with the constitutional right of a religious organization to freely shape its religious mission. NLRB v. Catholic Bishop of Chicago, 440 U.S. at 503-504.[8/] It found that

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8/ The Court's decision rested on statutory grounds and therefore did not reach the issue of the constitutionality of NLRB jurisdiction. The Court concluded that "Congress did not contemplate that the Board would require church-operated schools to grant recognition to unions as bargaining agents for their teachers." The Court noted, however, that "the record afford abundant evidence that the Board's exercise of jurisdiction over teachers in church-operated schools would implicate the guarantees of the Religion Clauses." NLRB v. Catholic Bishop of Chicago, 440 U.S. at 506 -507.

NLRB jurisdiction over church-affiliated schools would entail mandatory bargaining by the schools over "nearly everything" that went on in the schools. Since the schools were pervasively religious, the Court acknowledged that mandatory bargaining over "nearly everything" would encroach upon the clergy-administrators' autonomy to shape and direct the school's religious mission and would inevitably lead to conflicts between clergy and government. Id. at 503.

Application of the Act to religious organizations portends similar conflicts between churches and government. Like NLRB imposition of mandatory bargaining, the Act's comprehensive financial disclosure provisions and "reasonableness" standard subject all of a church's activities to state inquiry and regulation. A church is no longer free to make autonomous decision about raising and spend-

ing funds; its actions are instead subject to state oversight and evaluation. However, because the Department's aims are secular, they may conflict with a church's religious goals. The priorities and value judgments of a government agency and a religious organization are likely to reflect different concerns.

Imposition of secular standards by the Department also conflicts with the constitutional principle that civil authorities may not review or overturn the decisions of the highest church authorities "on matters of discipline, faith, internal organization, or ecclesiastical rule, custom or law." Serbian Orthodox Diocese, supra, 426 U.S. at 713. The principle reflects a judgment that religious organizations should have "power to decide for themselves, free from state interference, matters of church government,

as well as those of faith and doctrine." Kedroff, supra, 344 U.S. at 116.

In addition, a spending limitation may burden a church's ability to spread its religious teaching. The Court has recognized that a spending restriction reduces the quantity of expression in which an organization or individual may engage. Buckley v. Valeo, 424 U.S. 1, 19 (1976). A government-decreed spending limitation on salaries may impede a church's proselytizing efforts when financial support of ministers or church proselytizers constitutes a large part of its budget. Cf. Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. at 635-636. A limit on fundraising costs may also inhibit a church's ability to extend its message: a new church, intent on expansion, would be prohibited from using all of its resources to raise additional

funds.[9/]

Thus, if the Department imposes its secularly-based decisions on a religious organization, the government is interfer-

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9/ Even without the spending limitations, the Act is unconstitutionally burdensome. The Court has struck down state licensing requirements and fees when they "unreasonably obstruct or delay" solicitation. Cantwell v. Connecticut, 310 U.S. at 305 (solicitation conditioned upon state approval of the organization's cause as religious); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (tax on religious canvassing and soliciting). Although the Act does not mandate the payment of a tax before solicitation can take place, its requirements of registration, annual filing, and licensing and bonding of professional fundraisers place an unwarranted economic burden on religious organizations, entailing, among other costs, the use of expensive and time-consuming bookkeeping and reporting practices. Moreover, the potential costs of an investigation or litigation over failure to properly disclose, or other violations of the Act, are unpredictable. Those certain and potential expenses could discourage a new or poorly-financed religious organization from attempting to qualify to raise funds within the state, and thus inhibit its ability to carry out its religious mission.

ing with a church's freedom to shape and direct its religious mission. A church will inevitably be faced with abandoning its religious mission or being subject to the Act's sanctions: prohibition of fundraising, receivorship, or misdemeanor charges.

The Act will result not only in overt coercion of churches but also in more subtle coercion. The existence of disclosure requirements and the possibility of investigation and sanctions may create a chilling effect, prompting religious organizations to "steer far wider of the unlawful zone" created by the statute than the state could constitutionally require. Cf. Speiser v. Randall, 357 U.S. 513, 526 (1958). Every time a religious organization makes a decision about fundraising or spending, it must consider whether the Department will find its disclosure adequate or its expenses "reason-

able". To minimize friction with the Department and to avoid the risk of investigation or expensive litigation, a church may tailor its conduct to avoid conflict. Thus, a church's financial decision-making may evolve in a direction decreed not by its religious mission, but by the state. The knowledge that its financial records are open to press and public may also influence a church's actions. Individuals may be wary of becoming church officers knowing their names, financial decisions and salaries will be a matter of public record, particularly if a religion is unpopular. Cf. NAACP v. Alabama, 357 U.S. 449, 462 (1958); Buckley v. Valeo, 424 U.S. at 69-72.

C. Investigation and Interpretation of Religious Doctrine by Civil Authorities.

Investigation and interpretation of religious doctrine by civil authorities has been found to violate the Religion Clauses. Jones v. Wolf, 443 U.S. 595, 603-604 (1979) (civil courts could not decide a property dispute among members of the Presbyterian Church by interpreting a religious law, but could use only "neutral principles," such as trust and property law); Presbyterian Church v. Hull Church, 393 U.S. 440, 449-450 (1968) (civil courts could not adjudicate a church-related property dispute by deciding whether a church had departed from tenets of faith and practice); Cf. NLRB v. Catholic Bishop, 440 U.S. at 502 (NLRB jurisdiction over church-affiliated schools created a significant risk that the Religion Clauses would be violated because the Board would need to invest-

igate and resolve religious questions).

The Act's mandate that a religious organization maintain "reasonable" management costs, general costs and fundraising costs" could well involve the Department in constitutionally prohibited investigation and interpretation of religious doctrine. The Act presumes that costs exceeding 30% of total revenues are unreasonable. An organization, however, is permitted to argue that its expenses are justified by mitigating circumstances. When that defense is based on religious grounds, an inevitable occurrence when a religious organization is challenged, the government may become involved in deciding religious issues.

In NLRB v. Catholic Bishop, 440 U.S. at 502, the NLRB assumed jurisdiction over church-affiliated schools and alleged that they were engaged in unfair

labor practices. The schools responded that the practices deemed "unfair" by the Board were mandated by their religious creed. Since resolution of these claims would involve investigation into and resolution of doctrinal questions, the Court said such inquiry "may impinge on rights guaranteed by the Religion Clauses."

Application of the Act to religious organizations raises the same constitutional problems created by the NLRB jurisdiction over church-affiliated schools. Any consideration of a claim that expenditures of greater than 30% are required by a church's religious calling necessarily involves investigating and interpreting religious doctrine. Unless it imposes its own secular views or automatically accepts the church's claim, the Department must evaluate church tenets to discover if

expenses are mandated. Such evaluation of religious doctrine has been found unconstitutional when practiced by courts and cannot be practiced by the Department. Jones, supra, 443 U.S. at 603-604; Presbyterian Church, supra, 393 U.S. at 449-450. Doctrinal investigations may also involve the Department in other unconstitutional practices, such as discriminating against groups because they hold unpopular religious views, Fowler v. Rhode Island, 345 U.S. 67, 69-70 (1953), or deciding the truth of a religious belief, United States v. Ballard, 322 U.S. 78, 86-87 (1943).

The spectre of the Department deciding doctrinal issues is not far-fetched. For some religious organizations, high expenses for salaries to pay those spreading religious teaching

may be an integral part of their religious mission. Cf. Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. at 635-636. Fund-raising expenses may also be influenced by religious doctrine. For example, the Unification Church combines fund-raising with prosyletizing, considering both part of its religious mission and the essence of a religion composed of itinerant preachers. It would be impossible for the Department to question its fundraising expenses without investigating and interpreting its religious doctrine, and thus violating the Religion Clauses.

II. MINNESOTA CAN DEMONSTRATE NO STATE INTEREST SUFFICIENT TO JUSTIFY ITS EXCESSIVE ENTANGLEMENT AND INTERFERENCE WITH RELIGION

Amici agree that Minnesota can prohibit civil fraud by religious organizations. But the substantial disclosure requirements, investigatory powers and sanctions created by the Act are overly burdensome and far more intrusive than necessary to achieve that objective. Since the Act impermissibly entangles government with religion, the state must demonstrate that no less restrictive means are available to serve its interests. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); Sherbert v. Verner, 374 U.S. at 407.

No interest has been asserted that would justify the entanglement required by the Act. The purpose of the Act is to prevent fraudulent or deceptive

practices by charities. Minnesota's interests, however, can be accomplished without the Act's onerous requirements. As in the areas of free expression, broad prophylactic rules such as mandatory disclosure and a "reasonableness" standard are suspect, and the state must further its interests by means calculated to minimize intrusion on protected freedoms. In Re Primus, 436 U.S. 412, 432 (1978); NAACP v. Button, 371 U.S. at 438; Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. at 637. Here the state can satisfy its legitimate interests by prosecuting religious organizations if they commit fraudulent acts during their fundraising or solicitation efforts. Schneider v. State, 308 U.S. 147, 164 (1939); Cantwell v. Connecticut, 310 U.S. at 306 .

In fact, the practice of some federal agencies has been to exempt religious organizations from filing and disclosure requirements, leaving them subject only to antifraud provisions.[10/] Since Minnesota has not demonstrated, nor could it on this record assert, that its interests could not be served by far narrower statutes punishing forbidden conduct such as fraud, the Act is unconstitutional when applied to religious organizations.

10/ For example, the Internal Revenue Service accords religious organizations tax exempt status without requiring them to apply for such status. 26 U.S.C. §§501(c)(3), 6033. The Securities and Exchange Commission rules exempt from registration requirements religious organizations issuing securities "no part of the net earnings of which inures to the benefit of any person, private stockholder, or individual." 15 U.S.C. §77c(4). Although both agencies are empowered to initiate investigations if they have reason to suspect the perpetration of fraud, 26 U.S.C. §§7602, 7605, 15 U.S.C. §77q, the initial exemptions from filing properly minimizes governmental intrusion into religious affairs.

CONCLUSION

The judgment below should be affirmed, or the case remanded for consideration of Appellees' claims that the Act requires execessive governmental entanglement.

Respectfully submitted,

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*Amici wish to acknowledge the substantial assistance of Linda Ross, a student at Boalt Hall School of Law at the University of California, in the research and preparation of this brief.